

# Zimbabwe Law Review



Volume 14

1997

# THE ZIMBABWE LAW REVIEW

1997 VOLUME 14

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## EXPLORING LAW AND REALITY: WLSA METHODOLOGY: A ZIMBABWE VERSION?

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### INTRODUCTION

Women and Law in Southern Africa (WLSA) is, as its name suggests, a Southern African research organisation that focuses on issues that affect women, particularly those issues that intersect with the law in its most broadly pluralistic sense.

WLSA grew out of the concern of a group of Southern African academics working in the fields of women and the law and family law that there was a great deal of activist rhetoric and calls for the improvement of women's legal and social condition but there was little empirical data on how the law affected women and how women used the law.

At the outset the philosophy was that women would be able to improve their status and socio-economic positions by utilising the law that was in place. If there was no suitable law in place to deal with particular needs then it needed to be put in place. The theory being that if the necessary law was in place or once it was put in place then all that was needed to be done was for the content of that law to be disseminated. Then women would flock to utilise it, and magically, just by adding the wonder product "instant law" to their lives, their legally related problems would be solved. In retrospect this was a profoundly naïve, legally centralist, positivist vision of law's role in people's lives.

One of the first tasks that was undertaken at WLSA's genesis was a survey of the formal "in the books" legal position of women in the six countries that form WLSA; Botswana, Lesotho, Swaziland, Mozambique, Zambia and Zimbabwe (Stewart and Armstrong, 1990). The target was to identify the gendered differentials in the ways in which men and women were treated by the law. Although there was no empirical research undertaken, a general overview of women's formal legal entitlements in the region was produced. This survey of women's legal position was important as a starting point for the WLSA research and it will serve as a bench mark by which to assess the speed and efficacy of change for women in the legal sphere. A new edition of this volume would aid in determining the extent to which in the last 10 years women's legal position has changed in the region.

### TOWARDS A WLSA METHODOLOGY?

Even with the initial assumptions that the key to women's problems was to put appropriate legal measures in place and encourage women to use them, there was an evident need to explore women's understanding of the law and their perception of their legal rights or lack of them.

Methodologies that would facilitate this kind of research needed to be identified. Legal research methods focusing as they did, and largely still do, on normative ordering of the law, identifying at a philosophical level, gaps in the law and how to plug them does not engage with women's actual experiences of the law. The closest contact that such forms of research have with the lived reality of women's lives is through the sterile and distilled reports of litigation in law reports. At the daily level the average legal practitioner has a

remarkable litany of personal problems and lived experiences of clients that form the basis of his or her work. Yet much of the academic writing on the law prunes out the personalities and reduces the richness of peoples' lives to material facts and issues.

The researcher who seeks to make law more pertinent and accessible to people at large has to re-personalise law and discover how ordinary people view issues that the law purports to regulate and resolve. How do they view the law in its efforts to mediate or adjudicate in their disputes?

Uncovering how women's lives intermeshed with the law or did not intermesh with it created the need for a specialised and adaptive methodological framework. The WLSA agenda was a multiple one, there was a very strong motivation to go beyond the research level and deliver solutions for women be they legal, social or economic.

In the initial stages of the research the formulae for change were very much researcher perceived and driven. Our vision significantly informed what was recommended in terms of law reform. However with time, as we hope to show, our perspective changed so that the focus of reform was on the needs and desires of women as they articulated them to us. Hopefully, WLSA became more sensitive to a variety of perspectives on the rights and needs of women. However, that is a loaded statement, inevitably it is the researchers' view that informs the conclusions and recommendations that are arrived at. Perhaps at best one can attempt to create a reform agenda that is as open as possible to articulating the needs of the community. Put differently we would hope to be the "mouthpiece" of women from all walks of life, not the diviners of their needs.

From the outset, even if primitively articulated, there was a demand for action oriented research. Participatory action research was a catch phrase that was adopted. However, initial understandings of its implications left a lot to be desired. Thus, as with everything else in WLSA research, participatory action research became an evolving concept in itself.

## **ARRIVING AT THE INTERSECTIONS**

The empirical research carried out in the early days of WLSA soon disabused the "legal" members of the research teams of hopes of relying solely on legalistic notions of normative orderings and positivist approaches to resolving the legal problems of women.

What became rapidly apparent during the maintenance phase, which was the first empirical work undertaken by the teams was that there were constant intersections between law, in its many forms, and the pragmatic realities of human life. The notion of an intersection between law and lived reality proved a useful one to employ when exploring the problems that women face when attempting to pursue legal remedies or when legal remedies are applied to them.

All individuals live in an intersection between what might be termed the formal or normative aspects of law and policy and what is actually applied to them or might be applied to them by legal and administrative systems (Stang Dahl, 1987). This becomes more apparent and problematic when there is a marked divergence between the law's conceptualisation of issues and the practical application of its provisions especially in plural societies.

## **THE GATEWAYS OF THE LAW**

What an individual may regard as an appropriate and feasible remedy to resolve his or her problem may not coincide with the formal legal remedies that are available. In many



instances the law in its insularity, dispensing ready made remedies, puts its offerings on a take it or leave it basis. The aggrieved individual has to mould his or her complaint to fit through the narrow predetermined gateways of the law (Dengu Zvobgo *et al*, 1994). Yet the solution required, or the solution that is in the long term appropriate, may not be one canvassed by the general law in its many manifestations or by the formally recognised versions of the customs and practices that are deemed to constitute customary law (Weis Bentzon *et al*).

The breadth of choice in the choice of law process that WLSA has identified in the plural systems of law within its research area is explored in greater depth in *Which Law? What Law? Playing with the Rules* (Stewart *et al*, 1995). In essence this work identifies the range of options that individuals have in a plural system of laws in deciding which course of action they will pursue in the mediation of family based disputes. It also identifies the interplay between formal law, both general law and customary law, customs and practices of an ethnic group and what might be termed daily assumptions about appropriate normative behaviour which the term living law partly embraces.<sup>1</sup>

In brief the assessment of the authors is that individuals faced with what might be technically regarded as legal problems make choices as to what to do and how to do it from a variety of information bases. They are also affected by social, economic and cultural imperatives that may constrain their choice. An example illustrates this point:

A young Shona woman in a rural area of Zimbabwe finds herself pregnant by a man she has been having a relationship with. The couple do not wish to marry. The young woman is in need of financial assistance both before and after the birth of the child as she is without viable employment opportunities. She is well aware, as a result of legal education and information dissemination programmes that have been conducted in her area, of her right in terms of the Maintenance Act to claim maintenance from the father of the child. She knows the basic procedures to follow and is quite prepared to pursue the matter against him.

However, her own father is prepared to provide support to her and her child. He is adamant that any pursuit of maintenance through the courts is unacceptable to him as this would be, in his opinion, equivalent to the payment of *chiredzwa*, child rearing fee. His unshakeable perception is that this would entitle the father of the child to remove him when he was around seven years old.

Her father will not listen to arguments that *chiredzwa* and maintenance are two different concepts and that the law of Zimbabwe can be invoked to ensure that the custody and guardianship of a child remains with the mother of an out of wedlock child while the father remains obliged to pay maintenance for the child.

If she wants to remain with her father and rely on his support then she cannot entertain an action against the father of the child because her father has made it very clear that if she does so he will withdraw his assistance from her and the child.

Thus to understand the use or non use of maintenance laws by women, an added dimension was needed in the research design, that of mapping social and cultural practices and how they might influence women's choices.

1 Living law is a problem category for the legal scholar as it does not have a formal gateway into the determination of the courts. As Cottrell points out in many systems it is a mere polemic (Cottrell, 1992). However, in a legal system where pluralism is part of the structure, living law as it evolves into more permanent forms in the shape of customs and practices may have a gateway into the formal legal system (WLSA, Zim, 1994).

In retrospect after the maintenance research it was clear that there was a growing research agenda which needed to locate and analyse both the formal and informal law, general law and customary law as they affect women. Especial attention being paid to the norm creation and enforcement processes that take place in the semi autonomous social fields that swirl around and interact with the formal law (Falk Moore, 1979).

Research such as that undertaken into maintenance underlined that the women that the law purports to serve, as for that matter the men, are not a homogenous group and that what might be of benefit to one woman is not necessarily going to be to the advantage of other women. Research and reform agendas have to recognise this heterogeneity. Problematising the legitimate extent of recognising heterogeneity, both in cultural and gender terms is a topic for WLSA to grapple with (Stewart and Ncube, 1997).

What has become increasingly clear, during the evolution of WLSA, is that if the purpose of conducting research is to improve the position of women then the lawyer and the law reformer must address the problems faced by women where and how they occur.

In the Southern African context it is also glaringly obvious that the customary law as it is applied by the courts, is but one of the mediating factors in the ways in which women's lives are regulated and controlled.

This grounded process of research required methodologies that facilitated the identification, deconstruction and reconstruction of customary law particularly as it affected women.

## GETTING STARTED

### Conceptualising the Wheel

A *chirungu*<sup>2</sup> expression is that someone is *bundu* bashing, that is beating about in the bush, unsure where to go.<sup>3</sup> This is a fairly apt description of the initial WLSA research methods that were employed in the first active research phase of WLSA work, the maintenance research.

A collection of approaches such as using surveys, questionnaires, reading through court records, interviewing women in and around the courts were employed. Some of the ideas as how to conduct the research were gleaned from a methodology seminar that was held before the maintenance phase started (Armstrong, 1990). A wide variety of researchers from different disciplines made contributions based on their own experiences, some were legal researchers who dealt with legal advice as a research tool, others were activist researchers exploring legal information dissemination as a research methodology; social scientists made contributions on their successes and failures in using and devising various methodologies to explore the diverse terrains of women's lives (Armstrong, 1990). Especially for the burgeoning legal researchers this was a rich spread of routes to explore a reality which professionally had been channelled to them through the narrow gateways of the law.

As from a supermarket display the WLSA researchers selected what at that time titillated their mental palates. One of the consequences of this was a plethora of possible methods most of which were tried out, then in a more critical phase of the research reviewed, adopted, adapted or abandoned.

2 *Chirungu* (white person's way of doing or saying things.)

3 Savannah or Grasslands.

## Inventing the Square Wheel

A long questionnaire/survey form was drafted before the maintenance research was commenced by a so-called expert group, comprising mainly lawyers who sallied forth into the quasi sociological and anthropological fields, with wild enthusiasm. After the event the data that was collected using these forms was very difficult to code let alone analyse. In Zimbabwe SPSS was used to try and make sense of it but regrettably as the questionnaire had not been drawn up with the help of an SPSS expert this was a difficult task. Ultimately some sense was made of it by manual evaluation. The data was purely quantitative giving statistical profiles on maintenance and non maintenance seekers and recipients. As the research progressed it became evident that although some of these factors might affect the way in which women used and perceived maintenance the information was not really helpful in understanding the maintenance problems faced by women. Legal issues needed to be explored at the individual qualitative level rather than as a mass phenomenon, one case can turn the tide of legal history.

As with many research projects this raw data and the SPSS analysis is still "somewhere" and there are often suggestions that it might be used in the future, probably as a historical profile of women in Zimbabwe in 1990-91, that is provided the silverfish don't utilise it first.

Putting together a package of methods was what was needed and patching this together became the key process in evolving methodologies. Grounded development of methodology was taking place even if as yet it could not be named as such.

## Finding a Functional Wheel

Activist research methodologies that combined reform, legal information dissemination and academic research were very compelling as possible guiding methodologies for the WLSA work. For this reason the pioneering work of Stang Dahl, Hellum and Fastvold at the Institute of Women's Law at the University of Oslo became a key element in the designing of WLSA research methodologies. Their work forms part of the research tradition known as the Scandinavian Women's Law approach. This tradition, in its many diversities, takes women and their lived realities as a starting point in dealing with law, and ultimately law reform. A primary objective being to break out of the legal centralist, androcentric paradigms for the analysis of law.

The classic description of women's law methodology, wherever it is employed, is Tove Stang Dahl's:

The methodology of women's law is cross disciplinary and pluralistic and calls for a rather free use of the available material wherever it can be found. We can nevertheless distinguish three distinct methodological bases as fundamentals: the ethical, the empirical and the legal doctrinal. We discuss moral and political questions. We deal with empirical material. And we analyse current law. All this is done from the perspective of one looking upwards from below which I shall . . . call the women's law perspective. This implies that we wish to see law, reality and morality from women's points of view (Stang Dahl, 1988).

The distinguishing features of the various women's law methodologies are their adaptations in terms of detail to meet local circumstances and the multiple legal dynamics of a particular country or society. Within the WLSA research context there has been a pivotal emphasis on the dynamics of legal pluralism and the deconstruction and reconstruction of customary law so as to uncover the reality of women's lives as they are conducted within the shadow of complex overlapping systems of laws (WLSA, Zim, 1994, Stewart and Ncube, 1997).

## Putting Four Wheels on the Research Vehicle

Given the WLSA concerns about activist research it was necessary to create a symbiosis between the research into the lived experiences of women with law and legal issues and a concrete agenda for action oriented reform. Thus there was a need to determine how to channel the research findings into law and social reform. This is a far from easy task as given the normative orderings of the law and the processes of the creation of precedent, plus the ossification of customary law over the years by the courts, any attempt at law reform is akin to attacking one of the major bastions of the society.

For example if the new versions or interpretations of custom that are uncovered in the field are inconsistent with the court or academically recognised versions of custom, how is a challenge to the existing versions or interpretations to be managed? Locating and defining the gateways to challenge the existing conceptions of customary law are extremely problematic, as the gateways need to be determined from a variety of different perspectives. Locating the gateways and the correct strategy for approaching inferior and superior courts will differ as will the methods for dealing with the law reform gateway.<sup>4</sup>

Adjusting policy practices may, at a superficial level, seem less difficult than adjusting the formal legal approaches, however the semi autonomous social fields within bureaucracies may make them more impenetrable than the law. For example, to understand the problems women faced when they did attempt to deal with the formal legal system in inheritance matters, the administrative structures that regulated inheritance processes had to be interrogated. It transpired that many of the problems that women faced were not located in the law but in administrative processes. Supposedly gender sensitive laws were often stymied by the gender biases of the administrators. Devising ways to uncover these realities was a key element in the research design.

Selection of the appropriate mode for passing through an identified legal or political gateway was also a critical issue. For example, once a problem has been identified, should an assertive feminist approach be taken which demands change or should a process of dialogue leading towards reconceptualisation of women's rights and entitlements be pursued? Other activist issues range around modes of engaging with patriarchy and patriarchal values and the entrenched male dominated values of the law. Should reform measures be directed at promoting gender neutrality in legislative reform or, as later WLSA work shows, should there be a focus on uncovering the sexed and gendered reality of peoples' lives and working towards a core of gender neutral law with overt recognition of sex difference as and when necessary (Stewart and Ncube, 1997). These are critical questions that have to remain on the research table throughout the conceptualisation, research design, execution and analysis stages of each and every project as well as in the long term.

## DEVELOPING METHODOLOGIES: A STOCHASTIC PROCESS

As WLSA advances, research agendas and attendant enabling methodologies have to be constantly broadened to accommodate new directions and initiatives. Uncovering these realities had to be supported by an understanding of how to make the formal law both at the substantive and procedural levels respond to the lived reality of women's lives. In addition there was a need to create frameworks for dialogue with the individuals and structures within the wider society on the need for and nature of change.

4 For a more thorough discussion of this issue see Chapters 3 and 8 of Dengu-Zvobgo *et al*, *Inheritance in Zimbabwe: Law, Customs and Practices*.



The maintenance research was essentially a search for correctable defects in the system of maintenance delivery at the formal level, be they defects in the efficacy of the substantive law or the procedural aspects of its implementation. The Inheritance research phase was informed by the grounded realisation from its predecessor that there were constant intersections between the law and women's lived experiences in dealing with maintenance laws and practices. This raised questions about the significance of social and cultural values in regulating the way that individuals perceived and managed what lawyers would classify and treat as legal problems. It became increasingly evident through the maintenance research and starkly so in the inheritance research that there was constant intermeshing between the general law and customary practices and processes even at the level of the courts. Legal pluralism in its strongest sense was far more pervasive than conventional legal wisdom would have it. Zahle and Petersen's recognition of this in the Scandinavian context described as polycentrism, supports this hypothesis in a much wider context than just those countries with dual systems of official law (Zahle, 1996). At the design stage of the inheritance research there had been a conscious decision to look at the two main ethnic groups separately, that is the Shona and Ndebele and at other smaller ethnic groups such as Europeans so that a general profile of the inheritance practices across the country was built up (WLSA, Zim, 1994).

That legal pluralism existed within the duality of laws paradigm was evident but multi-tiered plurality within the operation of the law itself was something of a surprise. Legal pluralism was to be found within the courts where judicial officers would be informed by both the law in the books and the functioning of the semi autonomous social fields in which they lived out their daily lives. This was especially evident at the level of the lower courts, the then Community Courts, where local practices and values informed the mediation processes as did the views and representations of litigants as to what was the appropriate custom (WLSA, Zim, 1994).

## THE REALITY OF UNCOVERING REALITY

Local court presiding officers were aware that individuals would make conscious, instinctive or socially enforced choices about how to proceed in securing their futures after the breakdown of a relationship or the death of partner or provider. Legal solutions might be part of that package but not necessarily the most efficacious for individuals. Juggling options and balancing social and survival imperatives profoundly affected the choice processes of many women, even those who were well aware of their formal legal entitlements (WLSA, Zim, 1994; Stewart and Ncube, 1995).

Consequently when it came to undertaking the inheritance research there was a specific agenda not only to uncover women's experiences of the inheritance process but also to try and determine the content of the customs and practices that regulated local practices in inheritance.

WLSA thinking by this time had been informed by the works of Chanock, Rwezaura, Falk Moore and that of an expert WLSA group paper, "Uncovering Reality", which postulated that women's rights and entitlements under custom had been obscured by the male informed glosses of the colonial administrators and early scholars who attempted collections of customary norms (Chanock, 1985; Rwezaura, 1992; Falk Moore, 1979; Armstrong *et al*, 1993). Simultaneously as individual cases were followed up in the field the effect of the semi autonomous social fields on how the women involved were able to utilise the formal legal system or were excluded from its processes also had to be plumbed. It was readily

evident that social and family pressures would cause women to create "trade offs" over formal entitlements to ensure peace and harmony within families. Legal victories at the expense of social and family attachments were rarely sought by women, and then only by those who had the capacity to sustain themselves and their children in the face of animosity and sometimes harassment from the deceased spouse's family (WLSA, Zim, 1994).

More significantly descriptions were sought from interviewees as to what had happened when a family member had died. How had the succession process been managed? In group meetings this same approach was taken so that we could uncover the practice from the empirical data and then engage in a dialogue about the perceived customary norms that regulated these processes. To this extent the research was heavily influenced by Holleman and Falk Moore. Put more crudely respondents were asked an almost interminable set of interrogatories around the processes of inheritance: What happened? Who carried out the action or process? Why was a particular process followed? How was it carried out? What was the basis for that course of action? (Holleman, 1973; Falk Moore, 1979).

Answers to these questions, whether they described the processes or indicated the formal source of the determination were invariably followed by a further set of interrogatories. The next question technique was vigorously pursued.

### TROUBLING WITH THE TROUBLE CASE

A profile of practices from both trouble and trouble free cases was emerging and as Holleman suggests the trouble free cases may be as significant as the trouble case that requires formal adjudication in compiling the substantive content of a system of law (Holleman, 1973).

Arguably the so-called trouble free case reflects a response to the absorbed norms within the society thus the parties do not contemplate a dispute. This is, perhaps, because they are content with the socially mediated result or because there is perceived to be little point in challenging the entrenched and accepted norms within the society. A trouble case on the other hand in areas such as inheritance creates an opportunity to examine the competing versions of the prevailing normative orders that reside within a community and how individuals perceive their rights and entitlements, and how they should pursue them.

One of the most interesting and revealing trouble cases that arose during this phase was also methodologically important and the researchers' pursuit of its finer details illustrate a process of methodological progression. Unbeknown to the researchers a family selected by purposive sampling because they were known to have a protracted inheritance dispute in their midst, was involved in litigation over the very same issue in the Supreme Court at the time of the research. Thus the researchers were able to hold interviews with the extended family of the deceased, with the appellant and the respondent in the case as well as follow the path of the case through the narrow channel that was perceived as the entry point for customary law into the formal legal system. Similarly the main issues in the case could be presented to group interviews to see how the issues were regarded in a more abstract context. Such a conjunction is often not possible, and even if it is technically possible the parties might not be prepared to discuss the matter with researchers. However, they were eager to do so<sup>5</sup> and their diverse versions of the rights and the entitlements of the parties

5 Especially the appellant who once he learned of the researchers' interest in the case pursued them around the district on his bicycle eager to ensure that his side of the story was told. Whether he thought there was special power vested in the team to influence the outcome of the Supreme Court hearing niggled at the back of our minds.

gave a spur to the deconstruction process. The research on this case triangulated with Chanock's conclusion that versions of custom frequently reflect vested interests (Chanock, 1985).

*Mudzinganyama v Ndambukwa* S-50-93<sup>6</sup> proved to be a turning point in our understanding of the rights and entitlements of women within the realms of inheritance and of the way in which women's rights and entitlements were accessed within customary frameworks. The disputing males based their entitlements on their mother's or grandmother's rights to be protected and supported by the estate of the deceased male. Each recognised the inherent right of the women and their dependants to be supported by the estate. However, the content of the custom to be applied in determining who should be the heir was constructed by each of the proponents from his own best interests perspective. In the case of the appellant the formula was that the senior son of the first wife even if he was not the eldest son, *strictu sensu*, is the heir. Whereas for his nephew the son of the original heir the construction of the custom was that the eldest son, providing that he was able and willing to act, was the person to be appointed heir. In this case the eldest son had not been available and so the next son had been appointed. From the accounts of others present, at the relevant times, the most important element in the appointments had been the determinations of the family, although there were conflicting versions of what the family had decided, which again reflected the vested interests of the parties.

The intervention of the Supreme Court added a further dimension as McNally, J.A. just applied the rubric that the eldest son was the heir without any consideration of what had actually taken place or of the traditional customary processes. Yet the eldest son was not the person who was the heir, perhaps the fact that the original transfer of title had taken place some 30 years earlier precluded an unpacking of the processes as this could not be disturbed. However, the recycling of the inaccuracies as to determination, role and status of the heir was perpetuated.

A case such as *Mudzinganyama v Ndambukwa* when examined from a multiplicity of sources, that is in the court by way of passive observation, through interviews with the litigating parties and significant others, through analysis in a normative legal fashion, places the researcher in the heart of the multiple intersections between law and peoples' lived reality. Such an exercise facilitates the deconstruction of customary law and fuels the content of reconstruction processes. However, at the level of reconstruction it posits a variety of questions that interrogate not merely the content of custom but its jurisprudential content.<sup>7</sup>

Troubleless cases<sup>8</sup> in Matabeleland indicated that there were firmly entrenched principles in custom that directed families in dealing with family property. In retrospect the term deceased estate is not appropriate as the family did not regard the property of a married person as an estate until after the death of both spouses. What seemed at first blush to be inheritance practices was merely rearranging social structures to cope with new exigencies. Yet the law, because a man had died, looked for a deceased estate. However, families responding to the underlying customary values left the widow in control of the couple's property, both movable and immovable. The eldest son of the senior house took over his father's status but not the property, except that which was needed to meet his particular

6 For a fuller discussion of the case see WLSA, Zimbabwe, 1994 p 69ff.

7 The jurisprudential aspect of this question remains at the present rhetorical but it is a haunting issue.

8 Although in a legal context these would be troubled if the courts intervened with their version of customary law which favours the eldest son to be heir.

obligations to the family in the future. The youngest son, or the youngest son in each house, took general non intrusive responsibility for his mother's welfare. Only after her death would the bulk of the parents' estate be distributed and the youngest son would then take over the land allocation. Yet the law treated this as property to be disposed of in accordance with a constructed version of custom that the eldest son was the sole heir to his father's estate.

## RESEARCHING THE RESEARCHER

The exploration of these cases had a multiple effect methodologically. Researchers especially those with legal training realised that as with the ordinary person the law had disqualified their own experiences. A lifetime of personal observation of a youngest uncle living near and "caring for" a grandmother and of observing first hand property and land distribution practices had been overwhelmed by a received knowledge of custom obtained via the formal customary law as propounded by the courts. Treating the researchers more explicitly as knowers and bringing such knowledge to the surface thus became a method to be contemplated, with special emphasis on balancing and weighting such knowledge against other sources. Although there was a general overall research design, each researcher also had an area of particular interest when in the field, thus the questioning process would be embellished by these specific interests. For example, a researcher who was interested in the nature and form of customary law would pursue the structures and processes that mediated the decisions of the family or the local authorities. Uncovering the rationales that directed these decisions became a critical issue and led to a reconceptualisation of customary law from a rule based to a principle based system. For example, it became rapidly apparent that the so-called rule that the eldest son should inherit his father's estate under custom (as per Child, 1965) was a reflection of some determinations in which this had taken place. However, it was not the invariable norm as suggested by the decisions of the superior courts in cases such as *Vareta v Vareta* S-126-90 and *Murisa v Murisa* S-41-92. The primary concern was for the survival of the remnant family of the deceased person.

This revelation was triangulated by the concerns of other researchers who sought more in-depth data on how the remnant family of the deceased was cared for by the wider family and how issues such as grabbing of property were moderated within families. Instead of the somewhat callous and uncaring images portrayed by the press of inheritance practices, it appeared that the majority of families did their best to care for and protect the family of the deceased. Inheritance processes were open and pragmatic. Nonetheless there were significant differences between families and between ethnic groups.

## "LAW" IN THE COMMUNITY: THE POWER OF RUMOUR

Problems over inheritance were often due not to inappropriate or misapplied laws or customary norms but the result of intra family squabbles and personality conflicts. Other forces would also constrain or impel particular behaviours. For example, a supposedly prevalent phenomenon in inheritance matters was that of property grabbing. That it took place was clear but how successful or widespread it was turned out to be a very different matter. Justification for such actions would be diverse, claims of custom as the base might be asserted while others perceived an entitlement to share in a relative's estate based on the concept of family mutual support networks. Although the law provided legal remedies to inhibit and control property grabbing, social interventions were more often used than legal controls. Methodologically the power of law not as a formal device to regulate

behaviour but as an arm of the government process of social mediation emerged. Law as rumour, or as a part of folklore was often more significant in controlling behaviour patterns than law the formal tool of enforcement.

Ways of capturing popular conceptions of substantive law and legislative interventions had to be devised often on the spot. When individuals were asked in the field why widows were being left in control of their husband's estates their answers were often that the Law or the State says "Leave the widow alone" (WLSA, Zim, 1994). Identifying the actual legal base of this "rumour" was difficult. It might have been the provisions of what is now s10 of the Deceased Persons Family Maintenance Act Ch 6:03 or the general notion of abhorrence at the treatment that widows sometimes received at the hands of their spouses' relatives which prompted President Robert Mugabe to rail against these practices at funerals of prominent Zimbabweans. Whatever the sources were, they were frequently effective in controlling, thwarting or limiting grabbing practices among relatives. This produced a realisation that led to a need to reconsider activist strategies in disseminating legal information. In short every happening and initiative in and around inheritance had to be problematised and unpacked to identify its significance in relation to inheritance issues.

What had to be identified and explored was a multi-directional field of research in which a variety of questions from anthropological, sociological, legal, historical and psychological perspectives all within a gendered and generational framework had to be asked and pursued to the point of near intellectual exhaustion.

## VALUES, NORMS, CUSTOMS, RULES, LAWS AND PRINCIPLES

Such processes inevitably revealed the pervasiveness of legal pluralism and the significance of the reglementary power of semi autonomous social fields in inheritance matters. The approach that was emerging combined normative analysis of the law, both general law and the formal aspects of customary law, anthropological techniques in uncovering the customary norms at the level of the people, and how these operated and were influenced by and influenced the law in its formal operation. Historical analysis was undertaken to discover how customs had been skewed and ossified by the higher court processes. Internal comparisons of a legally centralist nature on the generation of legal norms was made between higher and lower court practices. Evolution of theories about different versions of customs — how they are created and sustained within the law and the legal system — inevitably emerged through the juxtaposition of these various research agendas (WLSA, Zim, 1994; Weis Bentzon *et al*).

The data that was emerging from this multitude of sources produced questions as to the nature, form and content of the customary law that the courts applied, the customs and practices of the people themselves and the way these two entities had become so dislocated from each other. Was the customary law as applied by the superior courts an authentic version of custom that merited the authoritative treatment it received? Was it an historical anachronism, ossified and inappropriate or perhaps a distorted creature that the senior judiciary applied for want of available alternatives.

The good bad debate that rages around customary law, especially as it affects the status and rights of women in the Southern African region proceeds from a number of different premises. Analysis of the customary law in the books in terms of a human rights, women's rights re-alignment and rectification processes, has produced a thesis that customary law is inimical to the rights of women. Cultural rights agendas constructed around the preservation of so-called customary law are argued by their antagonists to be designed to

defend what to liberal feminist ideals are entrenchments of patriarchy and patriarchal values. Which perspective informs the research is of critical importance methodologically, as the avenues that each opens up in terms of data and analysis are significantly different.

WLSA Zimbabwe researchers proceeded in part from the assumption that there was more to custom than an androcentric patriarchal conspiracy to exclude and oppress women.

Thus WLSA began exploring and critiquing the content of customary law as applied by the courts and captured in text book versions of customary law. This exploration proceeded from the assumptions that formal state customary law is the creature of the courts and that custom was skewed in the c19 collection processes to obscure women's entitlements (Chanock, 1985; Rwezaura, Armstrong *et al*). A further assumption was that customary law as captured and applied in the formal legal system manifests only the end result judicial determination between the parties and that this explains the construction of so-called formal customary entitlements for women. This assumption incorporates the notion that underlying these determinations are social values that translate into general guiding principles that informed the decision making processes of traditional judicial authorities. A critical assumption in this deconstruction-reconstruction process is that there is a customary jurisprudence through which these principles can be ascertained.

Also, part of the WLSA realist agenda was that even if customary law was the anathema to women's rights as postulated by some authors it was a reality that governed or significantly influenced the lives of vast numbers of the population of Southern African countries. Even if it were to be formally excised from the "law" it would persist as a social force, beyond dialogue with the state and social and legal reformers. The Mozambique experience where customary law was not recognised by the state courts but continued in operation nonetheless was a salutary lesson. Thus a critical part of the inheritance research and later the family forms research was to try and ascertain what was the jurisprudence of customary law, how did it evolve, what were the underlying values and principles that emerged when it was put under the "research microscope" (WLSA, Zim, 1997(a)).

Procedural issues, it transpired, had to be considered simultaneously with those of the substantive content of custom as it operated on the ground. The composition of decision making bodies within families was of critical importance as were the composition of chief's *dares*. Women's voices although muted were not absent from such councils. The role of *vate*, in Shona societies, was critical at all stages of inheritance decisions. Such women were often the source of family genealogies, and had the last word if not the final decision when it came to how estates should be divided and allocated. The same could be said of women in Ndebele societies.

Time frames for decision making were often protracted, especially in inheritance matters, with time for negotiation and exploration of options. A year's moratorium between a death and a *kurova guva* or *umbuyiso* ceremony, at which distribution of substantive property and future plans for the widow were made, gave time for informed and careful decision making. What emerged from this procedural investigation was the parallel evidence of the underlying concerns of these bodies for the remnant families of the deceased.

The construction of rights to land, or rights to access land shaped access rights. Such rights shape the routes that individuals follow to access land. Men and women within customary frameworks acquired entitlements to land on marriage, not as individuals. Land rights equally were not individual in character but to be used for the benefit of the group. Women within the family would receive in ideal situations their own field to cultivate, *tseu*. Women often had substantial cattle and small livestock holdings; women had the power to determine



the fate of their property and the use of their own fields. The superficial impression however when rights over land are tackled is that men are the source of such rights and women have few if any entitlements.

A truly gender sensitive approach to the research process is a necessary prerequisite in uncovering customary jurisprudence. The next question technique and exploring the values that inform decisions is critical if an understanding of how customs and practices are shaped is to be realised. Likewise it is not enough to unpack just the content of custom, the procedural aspects, who participates in decision making, how are decisions arrived at also informs this jurisprudential exercise.

## TRIANGULATIONS

Individuals when "cross examined" on issues around the family would discuss what they considered to be their values, what as individuals they considered from a cultural and family position important. Whether these same values emerged at the level of normative orderings of civil society was the next quest. If families told you that "in our culture" for example the welfare of the children is paramount, this might be described as a value. If at the level of inheritance practices in the family this was the prime consideration in deciding how to administer the property of the deceased then a value was triangulating with a norm. Further up the chain of adjudication within the customary frameworks was it possible to identify such values and norms at the level of principles that governed the approach to disputes? Chiefs when asked how they would determine such issues, or had done so<sup>9</sup> again indicated that the primary concern was for the welfare of the children in particular and for the wife or wives of a deceased man, or in the case of a woman, for the children and the husband. The detail of the determinations that were made being less important than the principle of the survival of the remnant family.

It was these principles that ought to have been captured in the compilations of customary law, not the end result of the application of those principles in specific cases. The jurisprudence inherent in custom that of the overriding welfare of the family, had resided within the people as a concept while it had been obscured by the "rulings" compilations of the formal law.

Also, and this was to prove very important, the parameters for debates about custom with traditional leaders and men at large had been broadened beyond the oppression discourse to that of values. This was a liberating debate for all parties, as when the social value or customary principle was raised it was possible to ask: "How would you deal with the needs of the family under particular circumstances?" For example, if there is no son, if the widow works in town and the couple had acquired the house together in an urban area. From the value principle base there was no hesitation that the widow had to remain in the home. The family mechanisms for achieving this might be informed by a belief that women could manage alone or that a male needed to be involved. However, the latter view was not necessarily oppressively patriarchal but could be just a failure to understand that women were able to cope alone, now there could be dialogue. Nonetheless, there were males who clung to the "laws" rules because it served their needs at that time.

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9 To some extent this had to be posed as a hypothetical question as Chiefs did not have jurisdiction in such matters. However, that they would intervene in matters was common knowledge. Thus it was a concrete hypothetical question.

Finding the methodologies to transcend the rule-bound versions of custom facilitates an understanding of the gap between the customary law in the books and the dynamic situation, sensitive versions of customs and practices that were found among the people, was the next step. Suffice it to say at this point that having traversed the empirical field the challenge then becomes to channel the data back through the gateways of the law, wherever they can be found (WLSA, Zim, 1994; Stewart and Ncube; Weis Bentzon *et al*).

## **TOWARDS SOME THEORIES IN WOMEN'S LAW?**

Making sense of the inflow of data and creating structures for its analysis was a further process that needed to be undertaken. Avoiding normative legal orderings of data and taking a more holistic women's law bias through the data was a challenge that was taken up but in reality normative discipline driven orderings and classification of data dominated the analysis in the early days.

The capacity to escape these imperatives is constrained when the research is issue and solution driven and also by the need for academic and professional acceptance of the research. The channelling processes required by the legal system, both hamper and enhance the analytical processes that can be undertaken. They hamper them through the need to create arguments that meet the demands of the existing law and the current interpretations of the law, whatever its derivation. These same constraints present a challenge that demands the sourcing of new data and creative arguments to fit the findings and conclusions through the same narrow channels, but in a way that will allow them to spread out and infiltrate the rest of the system once they have passed through the region of constraint.

One of the problems that women have faced in their process of accessing and addressing the law has been the androcentric, commercial and political agendas of the law that postulate legal problems within defined frameworks and treat issues as falling into certain legal categories. Women's experiences do not conform to these paradigms, likewise those of males do not necessarily conform either. The hegemonic nature of the law's process of defining the lives of those that approach it has proved problematic for women. Women's lawyers thus seek to derive broader life experience oriented formulations of issues that affect women especially in the area of the family and socio-economic arrangements of their lives.

Stang Dahl's perceptive description of the creation of thematic approaches to law as it affects women predicated on linked and interactive areas of the law that might otherwise be fragmented through content location in a variety of legal categories creates frameworks for more holistic and women appropriate re-sectioning of the law. Scandinavian work on linking issues that affect women in reproductive issues which are normally to be found spread across criminal law: rape, abortion, infanticide, family law; seduction, maintenance, marriage, paternity, fertility issues, labour law; maternity leave, child care, . . . provides new visions of the law.

Perhaps one could also say that the discipline of women's law originated because more women in more areas of society have been leaving traditional roles and developing new ones. These new roles entail a rapidly rising number of new relationships in private life, work life and public administration (Stang Dahl, 1987).

In the Zimbabwean context this phenomenon of change in women's lives was evident in a variety of ways through our research. Women were moving into new areas of social and economic activity and this created, as Stang Dahl suggests, the need for new perspectives and aggregations of legal sources. Not only have women moved into new areas of activity

but the traditional nature of the semi autonomous social fields around women have changed so that the mediating and controlling factors around women's access to resources need to be re-explored and examined to promote women's capacity to utilise these resources.

During the inheritance research in particular it became apparent that one of the areas that greatly affected women's capacity to take up legal options that were available was access to resources and the way in which family structures influenced women's choices. Understanding the family and its effect on women thus became the next task that was undertaken by WLSA.

Throughout the inheritance phase in relation to practices at the court, administrative, social and family levels, there had been an emphasis on actors and structures and how these mutually interacted. However, there had been inadequate time to thoroughly explore this, thus in the next phase it was determined that an investigation of how particular family structures impacted on women's lives and the extent to which individual actors influenced the structures and the women within them would be undertaken. To some extent we drew on Giddens as a starting point for this exercise but as is the want of the project, it took on a format of its own as the work progressed (Giddens, 1984).

In the inheritance research the role and status of women within families was clearly a factor that affected how they might fare after the death of a spouse. A woman who had an established identity within her marital family was less likely to be marginalised in inheritance processes than one who was a relative newcomer to the family. How the actors in semi autonomous social fields such as municipalities reacted when it came to dealing with housing rights for widows or the way that resettlement officers determined who would continue to occupy a resettlement area allocation profoundly affected not only the widow but the perception of the surrounding community of women's and in particular widows' rights.

Clearly there were forces beyond the law that affected women's *de facto* legal status and which shaped community thinking about women. All these were elements in the processes of improving women's legal, social and economic position that needed to be investigated.

## **FAMILY FORMS RESEARCH: CHANGE ON THE ROAD**

Women, it was surmised, were enmeshed in family structures in terms of their daily existence more so than men. Because of their dependence on families for material support it was assumed that they would need to negotiate with both their natal and marital families to access resources. Many women we hypothesised saw family as a resource in itself. Our data from the two previous phases showed that children were seen as a source of support especially by widows, even if the support did not necessarily materialise.

At the outset the hypothesis was that if family forms could be mapped then it might be possible to tailor the law to deal with the needs that arose because of the structuration of the form. There was within this an inherent assumption that the law was out of synchronisation with the way in which families actually operated (WLSA, Zim, 1997(a)).

In previous phases there had been a tendency on the part of the lawyers in the team to arm themselves with as thorough an understanding of the potentially relevant law before venturing into the field. This time the process of mapping the family was commenced as if we were the new age explorers, just following the metaphorical rivers of the family where they lead. The intention was to uncover the family forms and then create an analytical framework to use the data to reconceptualise the family and the law as well as their joint

effect on women. Using this approach it was postulated that a broader vision of the family and its role in law could be achieved which transcended the present demarcations of what is traditionally known as family law.

Thus a normative legal study was not the starting point, but family arrangements and the imperatives that drove them directed a grounded research process.<sup>10</sup> Family structures and interactions indicated that there were multiple agendas and needs that families filled, that families were sources of power and controllers of power. There were no ready made legal categories to use as guides to the sorting and analysis process, the data had to speak for itself and guide the processes. Suffice it to say that the final conclusion was that the family has a variety of arrangements within a single general form that was, in the Zimbabwean context, shaped around bonds of blood and kinship. The hypothesis was confirmed that family was a major mediator in women's lives, and a gateway that radically affected their access to resources.

Families were sites of gendered hierarchies, once again the gendered and generational dimensions were at the forefront. To some extent by this stage the methods were not problematic. The aggregation of data was however huge and it traversed as expected a wide spectrum of women and women's experiences. Analysis of this data inevitably drew together many aspects of the law, such as women and property law, women and reproductive rights, women and the right to work, women and access to land. Constitutional rights and international human rights pricked at our consciousness as we progressed. It was heady stuff, most importantly our perception of the women question in Zimbabwe was enriched from gendered, ethnic, economic, political, social, demographic, religious and many other perspectives.

As a background to future works and as a sequel to the earlier work it created a platform for greater understanding of the social dynamics that affect women's lives. Of itself it is more descriptive than analytical but the analysis will permeate future work. At the first level it shapes and informs its successor which was planned as a concomitant of it, the access to resources research.

What was immediately apparent was that, without a conscious intention to do so, a human rights agenda which had to encompass reconceptualising rights from the perspective of the African woman, whatever her situation or ethnicity, had to be tackled.

Critically, if women's capacity to access resources and in particular law as a resource was to be enhanced, the family had to be a site of state intervention to facilitate women's access to resources. Rights to resources had to be delivered through both vertical and horizontal mechanisms if women were to actualise their paper gains.

The Convention on the Elimination of All Discrimination Against Women (CEDAW), which we discuss elsewhere in greater depth was an inevitable focus of concern (Stewart and Ncube, 1997). Problematising the conceptualisation of its delivery agendas and modes of intervention was thrust upon the research team. What was it that women needed and wanted, who could speak for them? Epistemological problems arose: could a research team such as WLSA encapsulate the women's agendas and challenge the preconceptions or even affirm the *status quo* where appropriate? Women were knowers, women were strategists,

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10 The unlaywers in the group would state that it never was the starting point anyway. However, for the lawyers our journey away from the law so that we could journey back to in a richer fashion had really only just begun. In interdisciplinary research teams personal perspectives inevitably vary, that is the value of the interchange and interactions.

women were manipulators, women were within family frameworks, especially older women, skilful politicians.

The methodology of exploring women's realities within families and the strategies they used to access and maintain power and with it resources suggested that women invested in relationships as a resource. Yet the law does not take account of the significance of relationships for women (WLSA, Zim, 1997 (b)). International human rights instruments also proceed from a rights based relationship and do not address relationships.

As the analysis of this data proceeds a women's law approach could go further in shaping a re-sectioning of the law around factors that affect access to resources such as women and education, women and rights of choice, women and personal freedom, women and access to land, women and the right to work, women and the right to the fruits of labour, women and reproductive capacities, women and the right to children. As Stang Dahl points out:

The unbroken cross-section through rules of law indicates in itself the discipline's holistic character. The totality is emphasised when knowledge from the discipline's juridically interdisciplinary work is explained within the even more comprehensive structures of sex and society. Several sets of theories are necessary for this: theories of law and society (legal theories), women and society (feminist theories) and women and law (women's law theories) (Stang Dahl, 1987).

## WOMEN AND ACCESS TO RESOURCES

In the access to resources research which was complementary to the family forms research, the research design was intended to facilitate the capture of data that revealed how women were situated in relation to resources. How families organised themselves around resources, who determined allocation and access processes all needed to be uncovered.

This was a study that had to be undertaken from a gendered perspective. That is determining how the socialisation processes and cultural prescriptions of ethnic groups, community organisations, administrators and families affected how they actually dealt with access to resources as between men and women. Despite considerable volumes of legislation that in theory ought to facilitate women's entitlement to equal access to and control over resources to men this was clearly not the case in reality.

The research design had thus not only to encompass the gendered nature of women's access to and control over resources but also to seek indications as to what kinds of interventions were needed to effect improvements when and where defects were found. Keys to changing attitudes among officials would only be located when the sources of their gendered stereotyping of men and women had been identified and formulae for dialogue had been located.

Methodologically this was a direct outflow from the women's law method that seeks to map the gap between the laws provisions for women and the delivery of entitlements. However, in this case our attempt to achieve this required an exploration into the way that families constructed women's lives. For example, the problem of women and access to land transcended the examination of the operation of land allocation schemes and impelled the researchers to unpack the reasons for women's dependence on land as a resource. This inevitably revealed that many women treat marriage as a career, a conclusion that lead back to the lack of educational opportunities for many women. Family views on the differential need to educate boys and girls, with sons, especially among rural families being given the preference over daughters, were ascertained. The different life experiences of

males and females in terms of household tasks and daily roles were also of significance in trying to determine what affected women's capacity to take up the opportunities for gender equality or equity with men in later life.

How women invested in relationships to secure access to resources was a clue to their emphasis on children and marriage as a source of bonding and material security. Such approaches led to the hypothesis that women's needs have to be addressed throughout the system and as hypothesised in *Parting the Long Grass* the family has to be the subject of direct penetration if rights for women are to be delivered (Rwezaura *et al*, 1995). Of especial importance for women in this context are devising, based on the empirical data, ways of intervening vertically at the state level to ensure that girls have access to enabling resources. Research of this kind also indicates the need to explore ways of ensuring the horizontal delivery of rights from person to person.

Thus it was that the next theoretical issue that arose, prompted no doubt by the methodological designs of the research, was that of reconceptualising rights from a women's perspective. In a sense the project had in a roughly ten year period circled back to engage the Human and Women's Rights Agendas in a "dialogue" with the WLSA research. At the outset the agenda had been to bring rights to women. However, as noted, that was not a feasible agenda except at a superficial paper rights level. The probing around the issues of women and law, led back to problematising the very conceptualisation of rights as they were dealt with at the level of national constitutions and in international instruments such as the CEDAW. What was now being asked was "What do women need and want in the way of rights? What mechanisms are needed to effect delivery of these rights?"

Although there has been some preliminary work carried out in analysing the data collected over the years within this framework, the analysis and the attendant theorising around it is still at a very tentative stage.

Methodologically and theoretically finding the tools to determine the essential core of sex and gender equality and then mapping the penumbra of necessary sex and gender differentiation is an ongoing task.

## **A WOMEN'S LAW APPROACH TO CHANGE? TOWARDS A WOMEN'S RIGHTS METHODOLOGY**

Hellum postulates that what is needed is a Women in Law approach which:

... seeks to describe and analyse existing norms, concepts and legal systemisations from women's perspectives in order to create new norms, concepts and fields of law suited to the women's life course. It is premised on the view that legal values and principles are grounded from below (Hellum, 1996).

It might be further posited that there is need for a further progression to Gender in Law, GIL, where the gendered nature of law becomes a central focus in the research and the deconstruction and reconstruction of law in its multitude of forms from a gendered perspective becomes of prime concern (Stewart and Ncube, 1997). A concomitant of this approach is the search for a woman friendly reconstruction of law for women, without being man unfriendly, that addresses women's needs from their perspective and not merely as legatees of modified male paradigms.

Efforts are being made to place women and women's rights at the centre of the legal debate rather than as marginalised persons or those whose interests can be adequately accommodated by making the necessary grammatical adjustments to existing legislation.



Efforts at sensitising the courts to reconsider the ways in which women have been considered over the years are also at the forefront of efforts to improve the legal position of women.

However, one of the most fundamental problems that faces women in regard to these efforts is that the nature of their marginalisation, the reality and the extent of the prejudice that they may suffer is, for the majority of lawyers, even those who are concerned with the problem, including women lawyers, a matter of semantic consideration and analysis of the law.

The research process as it evolved created a bottom up complement to the top down approach of seeking inconsistencies and conflicts in the existing law between the rights of men and women. In this evolution normative legal skills had a key part to play. There is an assumption by those unfamiliar with the women's law approach to law that lawyering skills are abandoned. On the contrary lawyering skills are heightened by the need to identify or create the frameworks and gateways for feeding the findings and reconceptualisations back into pre-existing legal dogmatics and advancing the process of transcending the dogmas that guard the portals of the law and ending on their own terms women's protracted exclusion.

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